UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 18A
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MEMORANDUM

SUBJECT: Variances and Exemptions from Maximum Contaminant Levels Under the Safe Drinking Water Act

FROM: Joan Z. Bernstein (signed by David Biedart)
General Counsel (A-130)

TO: Victor J. Kimm, Deputy Assistant Administrator
Office of Drinking Water

This is in response to your request for a legal opinion concerning the issuance of variances and exemptions from maximum contaminant levels (MCLs) under Sections 1415 and 1416 of the Safe Drinking Water Act, as amended, 42 U.S.C. Section 300f et seq.[1/] Since the first National Interim Primary Drinking Water Regulations (40 CFR Part 141) took effect in June 1977, an increasing number of public water systems have sought the protection afforded by a variance or exemption. This memorandum is intended to clarify the conditions under which each may be granted.

The conditions for granting a variance from a maximum contaminant level are specified in Section 1415(a)(1)(A) of the Act which reads in pertinent part:

> "A State which has primary enforcement responsibility for public water systems may grant one or more variances from an applicable national primary drinking water regulation to one or more public water systems within its jurisdiction which, because of characteristics of the raw water sources which are reasonably available to the systems, cannot meet the requirements respecting the maximum contaminant levels of such drinking water regulation despite application of the best technology, treatment techniques, or other means, which the Administrator finds are generally available (taking costs into consideration.) Before a State may grant a variance under this subparagraph, the State must find that the variance will not result in an unreasonable risk to health." (Emphasis added) (42 USC §300(g)(4)).

Under Section 1416(a), a public water system may be granted an exemption based upon findings by the State that:

(1) due to compelling factors (which may include economic factors), the pubic water system is unable to comply with such contaminant level...,

(2) the public water system was in operation on the effective date of such contaminant level..., and

(3) the granting of the exemption will not result in an unreasonable risk to health." (42 USC §300(g)(5)).

Thus, both variances and exemptions may be issued to public water systems that are not able to comply with the applicable regulations by their effective date. At this point, however, the similarity ends. A public water system's inability to comply with the regulations may be attributable to two very different types of problems, and variances and exemptions are intended to address these problems separately.

Variances address the situation where a public water system is unable to comply with an applicable MCL due to poor source water quality, despite the application of the most effective treatment methods available. This situation was anticipated because Congress directed EPA to establish national primary drinking water regulations based upon that which could be achieved by public water systems with relatively uncontaminated intake waters after applying best available technology. Congress explained its rationale as follows:

If the Administrator were to assume that intake waters would in general be extremely contaminated, then many areas which are relatively clean could meet the maximum contaminant levels which the Administrator would prescribe without the use of the most effective treatment methods. This result would be inconsistent with the Committee's overriding intent to maximize protection of the public health. (House Report No. 93-I185, p.12)

Because Congress recognized that this policy might preclude some public water systems with extremely contaminated intake water sources from complying with the regulations, it authorized the issuance of variances to such systems (House Report No. 93-II85, p.13)[2/]

In contrast, exemptions address the situation where non-compliance is attributable to "compelling factors" such as economic constraints. In establishing national primary drinking water regulations, EPA was also directed to base its determination of what treatment methods are "generally available (taking cost into account)" on what might be reasonably afforded by large metropolitan or regional public water systems. Congress thus recognized that some (especially small) public

water systems would not be able to afford the methods determined by the Administrator to be "generally available" thereby delaying prompt compliance with the regulations. Such systems were specifically authorized to seek exemptions. (House Report No. 93-I185, p. 18).

This distinction between variances and exemptions is important for three major reasons. First, the principal condition for obtaining a variance is that the public water system must have the best technology generally available in place and operational to demonstrate that non-compliance is attributable to poor source water quality. It would be totally inconsistent with the Act's policy of maximizing public health protection to afford a system the protection of a variance based merely on a demonstration by the supplier that, if it installed the best treatment, it would not be able to comply with an applicable MCL. Rather, the statutory language is clear that a variance is only to be granted if compliance is not achieved "despite" the supplier's having taken all possible measures to minimize the public's exposure to the contaminant. By contrast, an exemption provides a supplier with additional time to install the requisite treatment to achieve compliance.

It is also important to note that the determination of "best technology generally available" is made by the Administrator when the MCL is established as a national primary drinking water regulation. The determination is not based upon a case-by-case judgment of feasibility for a particular system. This interpretation is compelled by the specific reference in Section 1415 to a finding of feasibility by the Administrator rather than by the State in making the variance determination and the close parallel between the language of Section 1415 and that language found in Section 1412 which sets forth the requirements for establishing national primary drinking water regulations.[3/]

The second reason why the distinction between variances and exemptions is an important one is that systems which are placed into operation after the effective date of an MCL are eligible to apply for a variance but not an exemption. Before an exemption may be granted, Section 1416(a)(2) requires a finding by the State that "the public water system was in operation on the effective date of such contaminant level." Thus, Congress intended that compelling factors, such as economics, not be used to enable a new system to commence operation without first being in full compliance with the applicable requirements. On the other hand, a variance might still be appropriate where, despite the new system's use of the most effective treatment method, it was not able to comply due to the poor quality of the raw water sources reasonably available to it.

Finally, Congress established different compliance timetables for variances and exemptions. A variance or exemption must be accompanied by the issuance of a compliance schedule within one year. Each compliance schedule must require that the public water system come into compliance with the applicable MCL "as

expeditiously as practicable" (Section 1415(a)(1)(A) and Section 1416(b)(2)(A)). However, whereas the compliance schedule for an exemption requires compliance not later than January 1, 1981 or January 1, 1983, if the public water system has entered into an enforceable agreement to become part of a regional water system, no such statutory deadline is imposed for variances.

This difference reflects Congress' recognition that compliance under the circumstances of a variance will likely depend upon the development of new or improved treatment methods or the existence of an alternative raw water source, which solutions are not readily amenable to mandatory statutory deadlines.

However, Congress did establish such deadlines for exemptions on the assumption that compelling factors such as economic hardship could be mitigated over time. Notwithstanding the problems which such deadlines may pose particularly to small water systems, compliance schedules for exemptions which are issued not later than one year after the issuance of the exemption must require compliance within the shortest possible time frame and may not extend longer than the statutory deadlines. Should such deadlines prove unreasonable, Congress has indicated that legislative changes may be considered. (House Report No. 93-1185, p.18).

In conclusion, variances and exemptions were not intended to serve as means for public water systems to easily or indefinitely delay compliance with maximum contaminant levels established under the National Primary Drinking Water Regulations. Prior to the issuance of a variance or exemption, the State is required to find that such issuance will not result in an unreasonable risk to the health of persons served by the system (Section 1415(a)(1)(A) and Section 1416(a)(3)). Moreover, the supplier is required to give public notification of the existence of each variance or exemption and any failure to comply with the requirements of any compliance schedule issued therewith (Section 1414(c)(2)). The compliance schedule itself must require compliance "as expeditiously as practicable" and contain interim control measures and increments of progress to be followed by the supplier while such variance or exemption is in effect (Section 1415(a)(1)(A) and Section 1416(b)). Any requirement of a schedule on which a variance or exemption is conditioned may be enforced as if such requirement was a part of a national primary drinking water regulation (Section 1415(a)(1)(D) and Section 1416(b)(3)). In return for the public water system's compliance with these requirements, the issuance of a variance or exemption protects a system otherwise in violation of an MCL from enforcement action under Section 1414 as well as from "citizen suit" under Section 1449 of the Act.

Under Section 1448(b) of the Act, the granting or the refusing to grant a variance or exemption, and the requirements of any schedule for a variance or exemption and the failure to prescribe a schedule, are subject to judicial review in the United States district courts. It is therefore important for decisions respecting the issuance of variances and exemptions to be carefully documented and that procedural protection afforded to public water systems by the Act be strictly followed.

cc: Jeffrey Miller
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FOOTNOTES

1/ Those sections also authorize variances and exemptions from treatment technique requirements prescribed under Section 1412. However, since such requirements have not yet been promulgated, this opinion will be limited to the issuance of variances and exemptions from maximum contaminant levels.

2/ Under Section 1412, the Administrator is also authorized to establish intake water quality requirements for those contaminants from which the Administrator determines that existing treatment techniques may be inadequate to assure achievement of the recommended MCLs (health goals) in all circumstances. These requirements have not been prescribed by EPA thus far but may be included in the National Revised Primary Drinking Water Regulations. If so, variances could be granted where intake requirements, and thus MCL output limits, were not complied with despite all reasonable technological, economic and legal efforts to do so. (House Report No. 93-1185, p. 13-14).

3/ The variance language is actually identical to that found in Section 1412(b)(3) with respect to the National Revised Primary Drinking Water Regulations which requires the Administrator's determination of "feasibility" to be based upon "the use of the best technology, treatment techniques, and other means, which the Administrator finds are generally available (taking costs into consideration)." The language in Section 1412(a)(2) pertaining to the establishment of National Interim Primary Drinking Water Regulations reads: "using technology, treatment techniques, and other means, which the Administrator determines are generally available (taking costs into consideration) on the date of enactment of this title." In light of this difference in language, it is possible to argue that variances were only intended to be granted from the Revised Regulations. However, given the purpose which variances are intended to serve and the fact that the Interim Regulations are not necessarily superseded by the Revised Regulations, it is reasonable to conclude that variances are authorized to be granted from Interim Regulations if the system has indeed installed "best technology" as determined by the Administrator and is still unable to achieve compliance with the applicable regulations.